89-784

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PATRICIA SWANSON,

Petitioner,

v.

ELMHURST CHRYSLER PLYMOUTH, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ELIZABETH HUBBARD *
ELIZABETH HUBBARD, LTD.
55 East Monroe Street
Suite 3420
Chicago, Illinois 60603
(312) 332-5988

DONALD G. PETERSON
SCHAFFENEGGER, WATSON & PETERSON
One East Wacker Drive
Suite 3504
Chicago, Illinois 60601
(312) 527-5566

Attorneys for Petitioner

* Counsel of Record

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether a Civil Rights Title VII plaintiff, who has been found by the district court to have been subjected to sexual harassment, can recover nominal damages, costs and attorney's fees, when her termination from employment is found to be factually unrelated to the hostile, offensive and intimidating work environment.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Patricia Swanson, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on August 16, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was reported at 882 F.2d 1235 (7th Cir. 1989), and is printed in Appendix A hereto *infra*, pages A 1-10.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at ____ F.Supp. ____ (N.D. Ill. 1988), and is printed in Appendix C hereto *infra*, pages C 1-6. The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, on motion for reconsideration is reported at ____ F.Supp. ____ (N.D. Ill. 1988), and is printed in Appendix B hereto *infra*, pages B 1-3.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (Appendix A, *infra*, pages A 1-10) was entered on August 16, 1989. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. Section 1254(a).

STATUTES INVOLVED

42 U.S.C. § 2000e-5(g)
Civil Rights Act of 1964

If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

29 CFR § 1604.11
Sexual Harassment

Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

STATEMENT OF THE CASE

This lawsuit was commenced by Patricia Swanson, an employee of Elmhurst Chrysler Plymouth, after her termination of employment by Roger Meacham, the manager and an owner of the car dealership. (R. 1; Appendix C 1). Swanson claimed violations of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (subsequently referred to as "Title VII"), arising out of the sexual harassment to which she was subjected while employed by the car dealership. (R. 1; Appendix C 1). The case was tried as a bench trial under § 2000e-5 of Title VII in the United States District Court for the Northern District of Illinois on March 28 and 29, 1988. (R. 42).

The Honorable Harry Leinenweber initially ruled that he could not award compensatory damages and entered judgment for Elmhurst Chrysler Plymouth. (R. 43-45; Appendix C 10). The district court did find Pat Swanson had proven that she had been sexually harassed during her

employment and that her work environment, created by Roger Meacham's conduct, was hostile, offensive and intimidating. (R. 44, 56; Appendix B 1 and C 2, 3).[1] The district court found that Swanson's termination of employment was for reasons unrelated to the sexual harassment which she endured while employed. (R. 44, 56; Appendix B 1 and C 3, 5, 6).

District Judge Leinenweber, upon Swanson's motion for reconsideration held that damages were to be awarded to Swanson as nominal damages, because he could not in these circumstances order affirmative relief through reinstatement. He held thereby that she was a prevailing party and entitled to her costs and attorney's fees. (R. 55-57; Appendix B 2, 3). In exonerating Swanson's civil rights, Judge Leinenweber expressed his reliance upon the precedent of the Eleventh Circuit. *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988). (Appendix B).

However, on appeal by Elmhurst Chrysler Plymouth, the Seventh Circuit reversed the district court's judgment,

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[1] Facts supporting the district court's finding of sexual harassment include the following incidents: Meacham's continued attempts to unhook Swanson's bra throughout the period of her employment; Meacham's requests to Swanson to have sex with him on several occasions; Meacham's pinching of Swanson's thighs despite her protests, and on one occasion causing her to spill a hot cup of coffee over her blouse and skirt, which prompted Meacham to offer to have cleaned if she took them off immediately; Meacham's announcement that he was going to retrieve a paper clip he had thrown down her sweater; Meacham's frequent comments before customers and employees about Swanson's breasts and how he wanted to grab them; Meacham's dropping of his trousers in front of her; Meacham's office attire consisting only of a towel and his quizzing of Swanson as to her reactions if he removed it, which he did; Meacham's remarks in front of male co-workers as to his speculations on Swanson's sexual interests. (R. 1)

for nominal damages but affirmed Judge Leinenweber in both his finding of sexual harassment and his finding that the harassment did not result in tangible, mathematically calculable, economic loss to Swanson. (Appendix A 6). This Petition does not challenge either of these findings or their affirmance on review.

The Seventh Circuit followed its own precedent of *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986), in reversing the district court, and stating that nominal damages are not available under Title VII. Conceding its decision in this case at bar to be "harsh", the Seventh Circuit relied upon a reading of Title VII that it offers no remedy if the victim experiences harassment with a non-economic and intangible impact, although Title VII promises equal terms and conditions to women in the work force. Other Circuits have addressed this issue and have upheld the award of nominal damages with the implicit expression that civil rights are not measured merely on economic terms.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

THE CONGRESSIONAL INTENT IN TITLE VII TO PROVIDE LEGAL PROTECTION AGAINST SEXUAL HARASSMENT IS NOW WITHOUT A JUDICIAL REMEDY, AS THE REVIEWING COURT REFUSES JUDICIAL RELIEF IN THE FACE OF ESTABLISHED VIOLATIONS OF THE ACT.

This Court has articulated Title VII's philosophy and promise. Title VII promises the " 'removal of artificial, arbitrary, and unnecessary barriers to employment' and

professional development that had historically been encountered by women and blacks as well as other minorities." *Connecticut v. Teal*, 457 U.S. 440, 447 (1981), *citing Griggs v. Duke Power Co.*, 401 U.S. 424 (1970).[2] The U.S. Congress states, in Title VII, it shall be unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). But Congressional fiat alone will not achieve this end. The power of the judiciary must be invoked.

To achieve this end, Congress directed the federal courts to fashion "affirmative action . . . as the court deems appropriate." 42 U.S.C. § 2000e-5(g). Congress has mandated that judicial relief be expansive, so as to cure the discriminatory practice. The Congressional mandate to the federal judiciary is to exonerate victims' civil rights, when Title VII is violated.

This grant to the judiciary has been broadly interpreted. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877 (2nd Cir. 1981); *Rodriquez v. Board of Education of Eastchester Union Free School District*, 620 F.2d 362 (2nd Cir. 1980); *McGuire v. Baker*, 421 F.2d 888 (5th Cir. 1970). Indeed, the judicial remedial impact that Title VII has had thus far significantly increased women's employment opportunities in the last quarter century. Rhode, *Occupational Inequality*, 1988 Duke Law Journal 1207, 1208.

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[2] Anachronistically, the inclusion of "sex" as a forbidden basis of discrimination under Title VII was offered as a floor amendment in the House by a congressman who voted against the Act and whose intention was to "clutter up" Title VII so that it would never pass. *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harvard Law Review 1111, 1167 (1971).

As the dimensions of sex discrimination were recognized through court actions, numerous courts, prior to *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), held that sexual harassment is actionable under Title VII as a form of sex discrimination, *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Williams v. Saxbe*, 413 F.Supp. 654 (D.D.C. 1976); *Munford v. James T. Barnes & Co.*, 441 F.Supp. 459 (E.D. Mich. 1977). Moreover, while courts recognized sexual harassment claims where the employer proposes to exchange an economic benefit for sexual acquiescence by an employee—*quid pro quo* harassment—a second, more subtle, type of sexual harassment was also being analyzed—hostile work environment.

Under a hostile work environment claim, the employee is subjected to forms of sexual harassment that do not involve a loss of economic benefit. The first court to address this form of sexual harassment was the District of Columbia Court of Appeals in *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). In rendering its decision in *Bundy*, the court relied heavily upon decisions involving ethnic and racial harassment. *Id.* at 944-45. After *Bundy*, other courts followed suit. *See, Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

Then, in 1986, this Court held that "a claim of 'hostile environment' sex discrimination is independently actionable under Title VII." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 73 (1986). In making that decision, this Court found that the "phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," not limited to economic or tangible benefits. *Id.* at 64. This Court's opinion in *Meritor Savings Bank*, embraces the principle that civil rights Title

VII violations can and do occur without a calculable financial, or "tangible", loss.

Title VII supports Swanson's claim for sexual harassment, in a situation where she had not suffered an economic or tangible loss. These civil rights claims, premised on hostile and sexually coercive work environment, by their very nature involve no measurable damages. This Court has yet to resolve the unanswered question from *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), of whether Congress intends Title VII to be a nullity for those women, whose civil rights have been abrogated by their employer's sexually offensive and pervasive conduct in their work place, but who are without monetary or tangible loss.

In recognizing the intent of Title VII to remedy non-economic detriment, the Eleventh Circuit has awarded the sexually harassed employee nominal damages and attorney's fees and costs as a prevailing party in offensive work environment cases. *Steel v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988). The Seventh Circuit has twice refused to grant such damages in the two cases which have been presented to it on this issue. *Swanson v. Elmhurst Chrysler*, 882 F.2d 1235 (7th Cir. 1989); *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986).

The conflict between these circuits needs examination within the context of the Congressional mandate to courts to fashion a remedy to rid the work place of invidious discrimination and preserve employees' enjoyment of their Title VII civil rights. Under *Bohen* and *Swanson*, the Seventh Circuit expresses its belief that nominal damages are not equitable relief, and cannot therefore be an avail-

able remedy under Title VII. In support of its rationale in *Bohen*, the Seventh Circuit relies upon cases that hold compensatory and punitive damages are not available under Title VII. *Bohen, supra*, at 1184. Swanson agrees that such damages are unavailable under Title VII. However, the Seventh Circuit's conclusion that nominal "damages" compensate for anything is erroneous. As the Seventh Circuit itself has noted in *Redding v. Fairman*, 717 F.2d 1105, 1119 (7th Cir. 1983):

> Nominal damages are not compensation for loss or injury, but rather recognition of a violation of rights. Nominal damages do not measure anything.

Similarly, this Court has held, in *Carey v. Piphus*, 435 U.S. 247 (1978), that nominal damages would be the proper award if actual (tangible) loss is not shown. In so holding, this Court observed:

> Rights, constitutional or otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interest, and their contours are shaped by the interests they protect. *Id.* at 254.

Nominal damages would neither compensate the victim, as compensatory damages do, nor punish the employer, as punitive damages do. Nominal damages simply recognize the civil right, and the violation of that right.

The Eleventh Circuit has awarded nominal damages to victims of sexual harassment where no tangible or economic harm was caused. *Steel v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988). Prior to these decisions, other courts have favored the use of nominal damages as the proper relief in such circumstances. *Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982); *Joshi v. Florida State University*, 646 F.2d 981 (5th Cir. 1981);

T&S Service Associates v. Crenson, 666 F.2d 722 (1st Cir. 1981).[3]

"Congress took care to arm the courts with full equitable powers" when it enacted Title VII since "it is the historic purpose of equity to 'secur[e] complete justice.' " *Albemarle Paper Co. v. Moody*, 22 U.S. 405, 418 (1975). The Seventh Circuit, by its ruling, tolerates the sexually harassing acts of Meacham, and has left Swanson with no remedy after having suffered a wrong. This statutory interpretation shortchanges a decades-long Congressional effort to exonerate civil rights.

II.

THE REVIEWING COURT'S DECISION PRODUCES A CONFLICT IN THE CIRCUITS, SINCE THE OTHER CIRCUITS WHICH HAVE CONSIDERED THIS IDENTICAL ISSUE HAVE ESTABLISHED THAT NOMINAL DAMAGES ARE THE APPROPRIATE REMEDY, WHEN TERMINATION OF EMPLOYMENT IS UNRELATED TO THE SEXUAL HARASSMENT.

This Court has had occasion in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) to address the rights of employees to be free from hostile and egregious harassment, based on sex. This Court, in *Meritor Savings Bank*,

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[3] In the Seventh Circuit, even though the employee is adjudicated to have been a victim of discrimination under Title VII, the employer is now held to be the prevailing party, whose costs incurred are to be paid by the party whose civil rights are judicially recognized as having been violated. If "Title VII is [to remain] the federal court mainstay in the struggle for equal employment opportunity for female workers of America," *Rabidue v. Oscela Refining Company*, 584 F.Supp. 419, 430 (E.D. Mich. 1986), this Court needs to explain the judicial relief women experiencing pervasive sexual harassment as a condition of their employment can expect from Title VII.

assured plaintiffs that sexually motivated employer conduct which created artificial and arbitrary barriers to equal conditions of employment, would be remedied through Title VII.

Now, the Seventh Circuit, in *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986) (and thus in the instant case), and the Eleventh Circuit in *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988), are split on the issue of whether nominal damages may be awarded a victim of discrimination under Title VII who has experienced these artificial, and intangible barriers to equal employment opportunity. Notwithstanding the acknowledged harshness of its "equitable" analysis, the Seventh Circuit, following *Bohen*, has ruled that no plaintiff can ever be a prevailing party in a "hostile environment" harassment case, if she is not terminated as part and parcel of the harassment pattern. The Seventh Circuit relies on decisions which do not analyze the issue of nominal damages in a Title VII context. The cases cited by the Seventh Circuit discuss only compensatory or punitive damages: *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 375 (1979) (general or punitive damages are not available under Title VII); *Muldrew v. Anheuser-Busch*, 728 F.2d 989, 992 n.2 (8th Cir. 1984) (no compensatory damages are available under Title VII); *Walker v. Ford Motor*, 684 F.2d 1355 (11th Cir. 1982) (no compensatory or punitive damages under Title VII);[4] *Bundy v. Jackson*, 641 F.2d 934, 946 n.12 (D.C.

[4] This holding in *Walker, supra*, is amplified and defined by the subsequent Eleventh Circuit decision in *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988). As with all cases cited by the Seventh Circuit, none of these cases hold nominal damages to be unavailable to a prevailing plaintiff.

Cir. 1981) (no damages for emotional harm are available under Title VII); *DeGrace v. Rumsfeld*, 614 F.2d 796, 807 (1st Cir. 1980) (neither compensatory nor punitive damages are available under Title VII). None of these cases discuss nominal damages.[5]

Despite the Seventh Circuit's current alchemic efforts to convert nominal damages into compensatory or punitive damages, nominal damages' essential nature is neither compensatory nor punitive. The purpose for nominal damages is to recognize and remedy a violation of a right. *Carey v. Piphus*, 435 U.S. 247 (1978).

Swanson seeks a viable remedy for the wrongs the district court finds she has suffered under Title VII. The Seventh Circuit's obdurate refusal to acknowledge nominal damages as an available remedy, not only frustrates the intent of Congress, but also leaves barren this Court's holding in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), for what value is a judicial finding of hostile environment under Title VII if no remedy is available?

The Eleventh Circuit's decisions do not fall into the Seventh Circuit's quagmire. *Steel v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988). In both decisions, the Eleventh Circuit awarded nominal damages to the plaintiff who had suffered sexual harass-

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[5] The district court decision in *Bohen v. City of East Chicago, Ind.*, 622 F.Supp. 1234 (D.C. Ind. 1985) was authored by Circuit Judge Easterbrook, sitting by designation in this district court trial. Judge Easterbrook also participated in the *Swanson* panel. The Seventh Circuit's precedent for its decisions in both *Bohen* and *Swanson* is Judge Easterbrook's district court opinion in the *Bohen* case. The district court opinion in *Bohen* was written prior to this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

ment but who had no tangible or economic injury. *Steel*, *supra*, at 1314; *Huddleston*, *supra*, at 905. The view set forth by the Eleventh Circuit has been independently recognized by numerous other circuits. *Katz v. Dole*, 709 F.2d 251, 153 n.1 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 906-07 & n.12 (11th Cir. 1982); *Joshi v. Florida State University*, 646 F.2d 981, 991 n.33 (5th Cir. 1981); *T&S Service Associates v. Crenson*, 666 F.2d 722, 728 n.8 (1st Cir. 1981).

The decisions of the Eleventh, Fourth, Fifth and First Circuits vindicate the civil rights of sexually harassed employees. In contrast, the Seventh Circuit is thwarting the broad Congressional mandate given to courts to remedy, not frustrate, Title VII violations. This Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), judicially recognized the right of action accruing to sexually harassed employees who have experienced no economic harm. Now, the judicial recognition of the remedy available needs determination.

Pursuant to Rule 17 of the Supreme Court of the United States, Patricia Swanson requests that this Court exercise its supervisory jurisdiction over the Seventh Circuit Court of Appeals in resolving this crucial and important question.

CONCLUSION

A judicial recognition of a civil rights violation can be the award of nominal damages. A judicial refusal to award nominal damages undermines the Congressional mandate given to federal courts to remedy sexual harassment dis-

crimination under Title VII. This Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), articulates Title VII's inclusion of sexually intimidating and hostile conduct as actionable, without economic or tangible loss. The use of a nominal damage award for a victim of sexual harassment has been independently sanctioned by several circuits, as a viable remedy when economic loss does not exist. The Seventh Circuit's decision in this case however has resulted in split decisions on this issue with the Eleventh Circuit.

Since the passage of Title VII in 1964, Congress and the judiciary have unflaggingly worked to maintain employees' rights and dignity in the work place, which the civil rights employment laws promise. Because of the Seventh Circuit's significant departure from this Congressional mandate, from this Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and from the authority of other circuits, Patricia Swanson respectfully requests that the United States Supreme Court exercise its power of supervision and resolve this important question of federal law.

Respectfully submitted,

Elizabeth Hubbard *
ELIZABETH HUBBARD, LTD.
55 East Monroe Street
Suite 3420
Chicago, Illinois 60603
(312) 332-5988

Donald G. Peterson
SCHAFFENEGGER, WATSON & PETERSON
One East Wacker Drive
Suite 3504
Chicago, Illinois 60601
(312) 527-5566

Attorneys for Petitioner

* Counsel of Record

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-2290

PATRICIA D. SWANSON,

Plaintiff-Appellee,

v.

ELMHURST CHRYSLER PLYMOUTH, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 1586—**Harry D. Leinenweber**, *Judge.*

ARGUED FEBRUARY 17, 1989—DECIDED AUGUST 16, 1989

Before EASTERBROOK, RIPPLE, and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* Plaintiff sued under Title VII of 42 U.S.C. § 2000e *et seq.* claiming discharge and loss of wages and benefits for refusal to submit to sexual harassment. The district court found that there had been harassment, but that the harassment had not caused plaintiff's discharge. The district court awarded the plaintiff a judgment with nominal damages of $1 plus attorney's fees.

The two questions on appeal are: (1) did the district court clearly err in finding that the sexual harassment

here did not cause plaintiff's discharge?; and (2) if the discharge finding was not clearly erroneous, can plaintiff obtain nominal damages and attorney's fees even if she is precluded from Title VII equitable relief? This court answers both in the negative, and reverses the award of nominal damages and attorney fees.

I.

Patricia D. Swanson began working for Elmhurst Chrysler Plymouth, Inc. (Elmhurst) in November, 1983 as an assistant finance manager. Although she had been out of the workforce for a period of time, her husband had been in the auto sales business for many years. When he embarked on a new business she decided to return to work. She interviewed with Roger Meacham, a part-owner and general manager of Elmhurst, and Bob Brietis, Elmhurst's finance manager and a friend of Swanson's husband. As a result of the interview she was hired.

During her first six months at Elmhurst, Swanson worked directly for Brietis, but he was then replaced by Sherry Kullen. This displeased Swanson because she felt she was qualified to replace Brietis.

In late November, 1984, Swanson requested a day off for personal reasons. Kullen denied her request because Swanson had already been absent two days that week. Swanson then went to Meacham, who gave her the day off. Kullen was angry that Swanson went over her head. A few days later, after Swanson missed several more days due to illness, Meacham terminated her, allegedly due to her absenteeism, but more probably in order to placate Kullen.

But Swanson now maintains that her situation involved much more than being absent from the job. She and other witnesses at trial portrayed Meacham as one who frequently confronted her with sexually suggestive remarks, humiliating comments in the presence of other people, and physical contact. Although some of the employees described the employment atmosphere as relaxed and friendly and

dismissed Meacham's conduct as harmless teasing, Swanson found the workplace hostile and sexually harassing.

II.

Although the district court recognized that sexual harassment could amount to discrimination under Title VII (following *Meritor Savings Bank v. Vincent*, 477 U.S. 57 (1986)), he concluded that Swanson was an at-will employee and that she had failed to meet her burden of proof under Title VII by showing that she had lost her job for reasons related to sexual harassment. Rather, he found that although Swanson had proved that she had been sexually harassed by Meacham, the harassment was not connected with her discharge. In his initial ruling, the district court recognized that it could not assess damages for noneconomic losses since Title VII remedies offer only equitable relief, including back pay and reinstatement, but not compensatory damages. Since Swanson was no longer an employee, the court could not exercise its equitable powers to enjoin the employer from engaging in unlawful conduct, since injunctions are available only to restrain present or threatened unlawful conduct.[1]

However, upon Swanson's motion the district court reconsidered its decision due to the Eleventh Circuit's subsequent opinion in *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900 (11th Cir. 1988). The district court found that *Huddleston* involved circumstances almost identical to Swanson's, where the plaintiff alleged sexual harassment by her auto dealership employer. The Eleventh Circuit declared that a plaintiff who alleges discrimination by sexual harassment need not demonstrate tangible economic losses to prove a Title VII violation. Although

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[1] "In the 'pure' hostile environment case, where an employee files an EEOC complaint alleging sexual harassment in the workplace, the employee seeks not money damages but injunctive relief." *Meritor Savings Bank v. Vincent*, 477 U.S. 57, 77 (1986) (Marshall, J., concurring in judgment).

the *Huddleston* plaintiff did not seek reinstatement, the Eleventh Circuit held that the sexual harassment entitled the plaintiff to recover nominal damages and therefore attorney's fees.

In view of *Huddleston*, the district court found that Swanson also had stated a Title VII claim for sexual harassment. The district court awarded Swanson nominal damages in the amount of one dollar, plus attorney's fees because she was the prevailing party in a Title VII suit. He still refused to reinstate her, however, because Swanson had lost her employment for reasons other than sex or sexual harassment.

III.

In Title VII sex discrimination cases, discriminatory intent findings are findings of fact entitled to appropriate deference upon appellate review. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 575-76 (1985) (Title VII). Under Fed.R.Civ.P. 52(a) such findings of fact are not set aside unless clearly erroneous, given the trial court's opportunity to judge witnesses' credibility. *Id.* at 573. If there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. The experience of a trial judge provides him expertise because his major role is the determination of fact. *Id.* at 574. The standard of review in a challenge to the verdict in a bench trial is identical with that in a jury trial. *IPEC, Inc. v. International Lithographing Corp.*, 869 F.2d 1080, 1083 (7th Cir. 1989), citing *United States v. William Thomas*, 864 F.2d 188 (D.C. Cir. 1988).

Here, we must resolve the questions of whether there was sufficient evidence for the fact-finder to decide without clear error that Swanson had been sexually harassed by Meacham, but that sex was not a determinative factor in her discharge. *Doe v. First National Bank of Chicago*, 865 F.2d 864, 873-74 (7th Cir. 1989). We bear in mind as we review these findings of fact that the trial court based his findings in significant part upon credibility determinations.

Although we may not freely substitute our own beliefs about the facts unless there was a clearly erroneous decision in the district court, we remain free to review errors of law based upon factual findings. Under Rule 52(a) we are obliged to correct errors of law including mixed findings of law and fact, and any finding of fact premised upon a rule of law. *Jennings v. Tinley Park Community Consolidated School District No. 146*, 864 F.2d 1368, 1373 (7th Cir. 1988).

A.

The district court held that Swanson had proven sexual harassment in the work place, even though the harassment did not cause her discharge. Elmhurst, while acknowledging we must give due deference to the factual findings of the district court, claims that the evidence was insufficient to meet the legal standards which constitute sexual harassment. Relying upon *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986), Elmhurst maintains that the plaintiff must show repetitive, pervasive, and psychologically debilitating effects in order to state a claim for sexual harassment.

As did the district court, we recognize that *Meritor Savings Bank* holds that sexual harassment in the workplace is a form of employment discrimination under Title VII. *Cf. Patterson v. McLean Credit Union*, 57 U.S.L.W. 4705, 4709 (U.S. June 13, 1989). *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 619-20 (6th Cir. 1986), sets out the five elements necessary for a sexual harassment claim.

> 1) The employee was a member of a protected class; 2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; 3) the harassment complained of was based upon sex; 4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile, or offensive working environment

that affected seriously the psychological well-being of the plaintiff; and 5) the existence of respondeat superior liability.

As we have said, we will reject the district court's findings as clearly erroneous only when we are of the solid conviction that a mistake has occurred. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Specifically, unless there is clear error, a court of appeals will respect conclusions of sexual harassment or hostile work environment based upon a district court's credibility choice. *Henson v. City of Dundee*, 682 F.2d 897, 906 (11th Cir. 1982). While the evidence presented was conflicting, at least to the extent of how Meacham's activities were perceived by various employees, we do not conclude that the trial court's finding that Swanson was subjected to sexual harassment was clearly erroneous.

In *Scott v. Sears, Roebuck & Co.*, the district court had held that the female plaintiff had failed to meet her burden because the complained-of conduct was *not* so intimidating, offensive, or hostile as to affect the Title VII terms, conditions, or privileges of her employment. 798 F.2d at 211, 213-14. Here, the trial court specifically found that Swanson had been sexually harassed. The facts support that finding, and we will not disturb it.

But the court's more significant finding was that Swanson's discharge was for a reason other than sexual harassment, possibly because of excessive absenteeism but probably in "an attempt by Meacham to placate plaintiff's superior, Kullen" (for his overruling her decision not to give Swanson a day off).

Based on the evidence, we conclude this finding was likewise not clearly erroneous. Nothing in the record ties the discharge, involving incidents occurring in the space of a few days, with the ongoing hostile atmosphere Swanson describes as existing for most of the year of her employment at Elmhurst. At oral argument, Swanson's attorney admitted that her work absences were not caused by illness or other maladies related to sexual harassment

or hostile workplace. Rather, Swanson denied that she was excessively absent and claimed that she performed the job well. Her original complaint was structured on wrongful discharge and not hostile environment. Thus, the court clearly did not err when focusing on reasons other than sex as the basis for the discharge.

B.

After the district court concluded that Swanson was discharged for reasons other than sex, Swanson moved for "reconsideration."[2] In reflecting on his previous order, the judge stated:

> The court found in its April 21, 1988 opinion that plaintiff established a *prima facie* case of sexual harassment against defendant but that plaintiff failed to prove that she was discharged for reasons related to her sex or sexual harassment. The court held that although plaintiff proved that she was sexually harassed affecting her psychological well-being and that psychological well-being was a term and condition of employment, the court must be in a position to apply equitable relief which it could not do. The court reconsiders this portion of its findings and conclusions in light of the Eleventh Circuit opinion in *Huddleston v. Roger Dean Chevrolet, Inc.*, ...

Following the lead in *Huddleston*, the court awarded Swanson nominal damages of $1 plus reasonable attorney's fees since she was now the "prevailing" party. Elmhurst challenges this award of nominal damages and attorney's fees.

Huddleston involved a claim of "constructive" discharge due to sexual harassment which affected plaintiff's promotions, salary and other benefits. The plaintiff quit, and the

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[2] The court construed the motion as one to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.

district court found (and the Eleventh Circuit affirmed) that she was not constructively discharged. But the Eleventh Circuit did reverse and held "the *prima facie* case for sexual harassment . . . may entitle her to receive nominal damages and, thus, she could become eligible for an award of attorney's fees." *Huddleston*, 845 F.2d at 905.

Unfortunately neither party here cited to the district court our preexisting opinion in *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986). Bohen, a former employee of the city's fire department, claimed she was discharged for, among other things, her sex, and that she was a victim of sexual harassment on the job. *Bohen* closely parallels Swanson's case. Hortencia Bohen was an Hispanic woman hired by the City of East Chicago Fire Department as a dispatcher in 1979 and discharged in 1983. Throughout her employment she was the victim of sexual harassment including pelvic contact, and language of an immediate supervisor that was profane and lewd. Bohen was the target of descriptions of the sexual fantasies of male employees, in which she was the fantasy object. *Bohen*, 799 F.2d at 1182-83.

Nevertheless, the district court denied her claims and concluded that she was fired for just cause. He further concluded that she was not entitled to nominal damages, costs and attorney's fees under Title VII for sexual harassment that did not result in discharge. In affirming the district court, this court held:

> Several circuits have begun to suggest in *dicta* that nominal damages could be awarded in situations like these to create a remedy on which to tack an award of costs and attorney's fees [citations omitted]. We believe the better view, in accord with the majority of decisions, is that no damages are available under Title VII. If Congress wishes to amend the provisions of Title VII to provide a remedy of damages, it can do so. Until then, this court may only enforce the statute as written, and as currently written Title VII does not contemplate damages.

Id. at 1184.

The district court in *Bohen* had elaborated further, pointing out that an award of damages is legal relief as opposed to equitable relief.[3] Title VII could not permit legal relief without affording both parties a right to a jury trial. *Bohen v. City of East Chicago*, 622 F.Supp. 1234, 1244-45 (D.C. Ind. 1985). Title VII plainly declares that a court may order such affirmative action as is appropriate, including but not limited to reinstatement, back pay, or any other equitable relief deemed appropriate by the court. 42 U.S.C. § 2000e-5(g).[4] Here, as in *Bohen*, where reinstatement, back pay, and any other sources of compensatory damages are not available, the defendant must prevail. Since nominal damages are not available as equitable relief, we must reverse the district court.

Under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, the district court may award attorney's fees to a prevailing party in civil rights litigation. But since Swanson cannot recover any award under Title VII, Elmhurst must receive judgment even if there has been a violation of that statute. *Rhodes v. Stewart*, 109 S.Ct. 202, 203-04 (1988) (42 U.S.C. § 1983).

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[3] The sexual harassment/nominal damages rationale applied by our *Bohen* appellate opinion was correctly articulated with somewhat greater elaboration by the district court opinion in that case, with which in relevant part this court agreed. *Bohen v. City of East Chicago, Ind.*, 622 F.Supp. 1234, 1245-46 (D.C. Ind. 1985). See *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1189 (7th Cir. 1986).

[4] Section 2000e-5(g) provides in relevant part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer . . . responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

At first blush, this result may seem harsh since Swanson has proved sexual harassment in the workplace. But her claim was for wrongful discharge because of unfounded claims of absenteeism and poor work performance. Harassing as the environment may have been, that was not the basis for her challenge of the discharge. Since no damages are available under Title VII (to redress violations of Title VII that have not led to the discharge) this court will enforce that statute as written. *Bohen*, 799 F.2d at 1184. There being neither an unlawful discharge here, nor a lawful award of nominal damages, the decision of the district court awarding nominal damages and attorney fees is

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 16, 1989.

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*

PATRICIA D. SWANSON,

Plaintiff-Appellee,

No. 88-2290 vs.

ELMHURST CHRYSLER PLYMOUTH, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 C 1586—**Harry D. Leinenweber,** *Judge.*

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX B

[FILED JUNE 10, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PATRICIA D. SWANSON,

Plaintiff,

v.

ELMHURST CHRYSLER PLYMOUTH, INC.,

Defendant.

No. 86 C 1586—Judge Leinenweber

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of plaintiff, Patricia D. Swanson, for reconsideration of the court's April 21, 1988 decision in favor of defendant, Elmhurst Plymouth Chrysler, Inc. Although not labeled as such the court will consider this a motion to alter or amend judgment pursuant to Rule 59(e), Fed.R.Civ.P. For the reasons stated herein, the motion is granted in part.

The court found in its April 21, 1988 opinion that plaintiff established a *prima facie* case of sexual harassment against defendant but that plaintiff failed to prove that she was discharged for reasons related to her sex or sexual harassment. The court held that although plaintiff proved

that she was sexually harassed affecting her psychological well-being and that psychological well-being was a term and condition of employment, the court must be in a position to apply equitable relief which it could not do. The court reconsiders this portion of its findings and conclusions in light of the Eleventh Circuit opinion in *Huddleston v. Roger Dean Chevrolet, Inc.*, 86 C 5086 (May 20, 1988). This sexual harassment case involved circumstances almost identical to this case in that plaintiff had proved that she had been sexually harassed but had not proved that she was discharged due to reasons of her sex or because of sexual harassment. Nevertheless the court held that she stated a claim for sex discrimination under Title VII and could thereby be entitled to an award of nominal charges and her attorney's fees.

The court therefore finds that plaintiff here has also stated a claim under Title VII for sexual harassment and the court awards her nominal damages of one dollar. As the prevailing party in a Title VII suit plaintiff is entitled to an award of attorney's fees.

The court takes this opportunity to clarify several points in its earlier opinion. The court finds that plaintiff failed to prove that her denial of promotion to the position of finance manager was based on an impermissible paramour preference by defendant and its employees for Sherry Kullen. In its previous opinion the court refused to enjoin defendant's practices; this is because the court found that there was no evidence that any of the unlawful practices were continuing. None of the other female employees complained of such practices. In addition plaintiff neither made nor sought to prove any class allegations.

The court also denies plaintiff the remedy of reinstatement because the court found that plaintiff was discharged for reasons other than her sex or sexual harassment, thus rendering reinstatement inappropriate.

Therefore the order of the court is that the judgment of the court of April 21, 1988 in favor of defendant and against plaintiff is hereby altered and amended as follows:

Judgment is entered in favor of plaintiff, Patricia D. Swanson, and against defendant, Elmhurst Plymouth Chrysler, Inc., in the sum of one dollar. Plaintiff is further awarded reasonable attorney's fees. Plaintiff is to submit attorney's fees request within seven days, defendant to file objections within seven days. The court will rule on July 1, 1988.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
Judge
United States District Court

DATED: JUNE 10, 1988

APPENDIX C

[FILED APRIL 21, 1988]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PATRICIA D. SWANSON,

Plaintiff,

v.

ELMHURST CHRYSLER PLYMOUTH, INC.,

Defendant.

No. 86 C 1586—Judge Leinenweber

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. This is a proceeding brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* Plaintiff claims she was discharged and thus lost actual wages and benefits as a result of being discharged for failing to submit willingly to sexual harassment of her employer.

2. Plaintiff, Patricia D. Swanson ("Swanson"), was employed by defendant, Elmhurst Chrysler Plymouth, Inc., as an assistant finance manager from November 6, 1983 through December 1, 1984, at which time her employment was terminated by Roger Meacham ("Meacham"), general manager and part-owner of defendant.

3. Plaintiff filed charges with the Illinois Department of Human Rights in January of 1985 and with the Equal Employment Opportunity Commission in June, 1985 and has complied with all requirements of Title VII in proceeding with this suit.

4. For the first six months of her employment plaintiff's direct supervisor was Robert Brities ("Brities"), with whom she had an excellent relationship.

5. Brities left defendant's employ in May of 1984 and was replaced by Sherry Kullen ("Kullen"). This was displeasing to plaintiff because she felt that she was competent to replace Brities.

6. Although defendant maintained that plaintiff was habitually tardy and absent from work, it maintains no records that establish absences or tardiness of any of its employees.

7. In late November, 1984, Swanson requested a day off work for personal reasons. She presented this request to Kullen who turned her down because she had already been absent for two days that week. Plaintiff then went to Meacham and requested the day off, which was granted. Kullen was unhappy and angry with plaintiff for having gone over her head. Plaintiff was terminated a few days later, on a Monday. She had been off work as a result of an illness the preceding Thursday, Friday and Saturday.

8. On Monday she was terminated by Meacham allegedly as a result of absenteeism.

9. Plaintiff recounted numerous instances of sexual harassment by Meacham occurring over the time she worked for defendant. These instances included sexually suggestive comments, humiliating comments in front of coworkers and outside people, and physical contact.

10. Other employees described the atmosphere of employment as "relaxed and friendly" and described Meacham's conduct as "harmless teasing."

11. Plaintiff, a female, is a member of a protected class.

12. Plaintiff was subjected to unwelcome sexual harassment to which members of the opposite sex had not been subjected.

13. She was discharged from her employment with defendant.

14. The reasons for her discharge from employment with defendant were unrelated to her sex, but most probably was an attempt by Meacham to placate plaintiff's superior, Kullen.

CONCLUSIONS OF LAW

1. The court has jurisdiction pursuant to 42 U.S.C. §2000e *et seq.*

2. Although plaintiff proved that she received sexual harassment from defendant's general manager she failed to prove that the sexual harassment complained of affected a "term, condition or privilege" of employment.

3. Plaintiff failed to prove that her discharge was for reasons related to her sex.

4. Defendant is entitled to judgment in its favor and against plaintiff.

DISCUSSION

This is a Title VII sex discrimination case in which plaintiff contends she was discharged from her employment because she refused to cooperate by submitting to her supervisor's "extreme and outrageous" sexual harassment. Plaintiff seeks back pay, benefits, attorney's fees and costs.

Sex discrimination based upon sexual harassment in the workplace is a relatively recent development in the law and is now well established that sexual harassment can amount to discrimination under Title VII. *Meritor Savings Bank v. Vincent,* 106 S.Ct. 2399 (1986).

There are two predominant categories of sexual harassment claims: *quid pro quo* and work environment. *See,*

note: Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 *Harvard Law Review*, 1449 (April 1984).

Quid pro quo harassment involves the choice between acceding to sexual demands or forfeiting job benefits, continued employment, or promotion. The second category involves persistent subjection of female employees to an intimidating hostile or offensive work environment. While *McDonnell-Douglas* analysis works well in the former it is somewhat unworkable in the latter.

Under *McDonnell* in order to establish a *prima facie* case she must show (1) that she is a member of a protected class; (2) that she was subjected to unwelcome sexual harassment to which members of the opposite sex had not been subjected; (3) she was discharged; and (4) after discharge the position remained open and the employer tok steps to replace her. As in *McDonnell* the burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the discharge. The burden of course remains on the plaintiff to prove that the reason put forth was pretext for the real reason which was refusal to submit to the sexual harassment.

Although plaintiff established a *prima facie* case the court has found that plaintiff has failed to establish by a preponderance of evidence that the reason for her discharge was related to her refusal to submit to harassment.

Plaintiff was discharged for the stated reason of excessive absenteeism. In addition to some days she took off for illness, she took a day off for personal reasons, going over her superior's head to the very person she claims was harassing her. Whether the real reason was excessive absenteeism or employee morale (the morale of plaintiff's superior Kallen) is not clear. However plaintiff was an employee at will who could be fired for any reason other than sexual harassment. She had the burden of proof under Title VII of proving that it was sexual harassment. She failed to do so. All she proved is that she was sexually harassed.

The second category of sexual harassment cases requires a somewhat different analysis. The Eleventh Circuit in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), has developed a five-part analysis for working condition sexual harassment claims:

1) the employee belongs to a protected group;

2) the employee was subjected to unwelcome sexual harassment;

3) the harassment complained of was based on sex;

4) the harassment complained of affected a term, condition or privilege of employment; and

5) *respondeat superior*.[1]

Plaintiff similarly fails to win on this *Henson* five-prong test. Although the first three and the fifth prongs of the *Henson* test have been adequately established in the record: plaintiff is female, she was subjected to unwelcome sexual harassment which was based upon sex. However her case fails on the fourth prong in that she has failed to prove that the harassment complained of affected a "term, condition or privilege" of employment.

Although case law establishes that state of psychological well-being is a term, condition or privilege within the meaning of Title VII (*Rogers v. EEOC*, 454 F.2d at 238), the court must be in a position to apply relief. Here the court has found factually that plaintiff was discharged for reasons unrelated to her sex or sexual harassment. If plaintiff however was still an employee the court of course could fashion relief using its equitable powers to enjoin the employer from engaging in such unlawful employment practice. However an injunction will issue only to restrain

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[1] The *respondeat superior* prong has of course been litigated extensively since *Henson* was handed down and culminated in *Meritor Savings Bank v. Vincent*, 106 S.Ct. 2399 (1986). Since the alleged harasser in this case was the top management employee on the premises, *respondeat superior* is not an issue.

present or threatened unlawful conduct. *EEOC v. Sheet Metal Workers Intern Assn. Local # 122*, 463 F.Supp. 388 (D.C. Md. 1978). Here plaintiff is gone and none of the other employees testifying in the case complained of sexual harassment.

The court cannot assess damages for non-economic losses. The remedial provision of Title VII provides only for equitable relief, including back pay and reinstatement, and do not include compensatory damages. *Hayden v. Atlanta Newspapers*, 534 F.Supp. 1166 (D.C. Ga. 1982); *Mau v. Parkside Livonia Credit Union*, 525 F.Supp. 786 (D.C. Mich. 1981). Specifically the court cannot award damages for mental suffering or emotional distress sustained as a result of the alleged sexual harassment. *Henson*, p.897. To recover damages for this type of conduct plaintiff is left with her remedies at common law, such as assault and battery and intentional infliction of emotional distress. *Henson*, p.904. Accordingly, the court finds in favor of defendant and against plaintiff. Judgment is entered in favor of defendant, Elmhurst Chrysler Plymouth, Inc., and against plaintiff, Patricia D. Swanson.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
Judge
United States District Court

DATED: APRIL 21, 1988

Supreme Court, U.S.
FILED
DEC 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-784

In The

Supreme Court of the United States

October Term, 1989

PATRICIA SWANSON,

Petitioner,

v.

ELMHURST CHRYSLER PLYMOUTH, INC.,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether nominal damages can be awarded under Title VII of the Civil Rights Act to a plaintiff who is not entitled to reinstatement, back pay or other equitable relief.

2. Whether an employer's admittedly ribald or off-color sense of humor can be sufficient to create a hostile work environment actionable under Title VII of the Civil Rights Act.

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No. 89-784

In The

Supreme Court of the United States

October Term, 1989

PATRICIA SWANSON,

Petitioner,

v.

ELMHURST CHRYSLER PLYMOUTH, INC.,

Respondent.

BRIEF IN OPPOSITION FOR RESPONDENT

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

In this petition, Patricia Swanson ("Swanson") asks this Court to hold that the remedies encompassed by Title VII of the Civil Rights Act (42 U.S.C. §2000e, *et seq.*) are not limited to back pay, reinstatement and other forms of equitable relief. Rather, Swanson claims that Title VII should be interpreted expansively to create a remedy of nominal damages in hostile work environment cases. Because an award of damages is not permissible under Title VII, nominal damages may not be awarded merely

as a vehicle to enable the plaintiff to recoup attorney fees and costs.

Even if Swanson were to succeed in expanding the scope of equitable remedies provided by Title VII to include a damages remedy, Elmhurst Chrysler-Plymouth ("Elmhurst") submits that Swanson did not prove the existence of a hostile work environment under the test established by this Court in *Meritor Savings Bank v. Vincent*, 477 U.S. 57 (1986).

II.

A. The Seventh Circuit's Interpretation Of The Scope Of Judicial Remedies Available Under Title VII Is Correct.

After a trial on the merits, the district court rejected Swanson's claim that she had been terminated from her employment at Elmhurst for reasons related to sex discrimination. *See, Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 822 F.2d 1235 (7th Cir. 1989). The district court ruled that Swanson's dismissal was in fact the product of a personality conflict with her immediate supervisor, Ms. Sherry Kullen. Despite this finding, on reconsideration, the district court stated that Swanson had been previously subjected to a "hostile work environment" at Elmhurst and was entitled to nominal damages and attorney's fees – even though her discharge was completely unrelated to the work environment and her termination was legally proper. In her petition for a writ, Swanson accepts these key factual findings of the district court and admits that her termination did not constitute a Title VII violation. *See*, Petition for Writ of Certiorari at 5. Thus,

Swanson's claim rests solely upon the proposition that Title VII provides a damages remedy in addition to equitable remedies.

The Seventh Circuit Court of Appeals in the *Swanson* case and in *Bohen v. City of East Chicago, Indiana*, 799 F.2d 1180 (7th Cir. 1986), has correctly held that nominal damages is not a species of judicial relief which is available under Title VII. The remedies provision of Title VII is quite explicit in limiting a petitioner to back pay, reinstatement or other forms of equitable relief:

> "If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g).

Prior to this Court's decision in *Curtis v. Loether*, 415 U.S. 189 (1974), there was some question as to whether the remedial provisions of Title VII could be interpreted to permit an award of damages in addition to equitable relief. One year prior to the *Curtis* decision, the Second Circuit issued its decision in *Gillin v. Federal Paper Board, Inc.*, 479 F.2d 97 (2nd Cir. 1973).

In *Gillin*, the plaintiff sued for $250,000.00 in compensatory damages. With very little analysis, the court stated,

in dicta, that compensatory damages might possibly be awarded in a Title VII action. 479 F.2d at 103.

In light of the subsequent *Curtis* decision, it became apparent that Title VII remedies were limited to equitable relief only and that the *Gillin* dicta regarding compensatory damages was an erroneous interpretation of Title VII. Virtually every circuit court, which has subsequently considered the issue, has rejected *Gillin's* dicta on compensatory damages. *See, Walker v. Ford Motor Company,* 684 F.2d 1355 (11th Cir. 1982), and cases cited therein; *accord, Bohen, supra,* 799 F.2d at 1184.

Although *Gillin* was wrongly decided, it became the key case in the subsequent development of the nominal damages issue in some of the federal circuit courts.

Gillin was the only circuit court of appeals case relied on in *Joshi v. Florida State University,* 646 F.2d 981, 991 n. 3 (5th Cir. 1981). Although *Gillin* did not deal with nominal damages *per se,* the *Joshi* court apparently considered that the *Gillin* holding, with respect to compensatory damages, was equally applicable to nominal damages under Title VII.

Joshi, in turn, was relied upon by the First Circuit in *T & S Service Associates v. Crenson,* 666 F.2d 722 (1st Cir. 1981). The First Circuit did not engage in any thorough analysis of the nominal damages issue.

Since *Joshi* was a Fifth Circuit case, it assumed immediate precedential value with the creation of the Eleventh Circuit Court of Appeals. *Joshi,* therefore, became the basis for an award of nominal damages in *Henson v. City of Dundee,* 682 F.2d 897, 905 (11th Cir. 1982). *Henson* was

relied upon in the subsequent Eleventh Circuit case of *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 905 (11th Cir. 1988). The Fourth Circuit case of *Katz v. Dole*, 709 F.2d 251, 253 n. 1 (4th Cir. 1983), relied exclusively on *Joshi*.

Thus, the array of authority, marshalled by Swanson in support of her nominal damages argument, is neither impressive nor persuasive. Far from being a product of reasoned judicial analysis, the cases cited are, in actuality, nothing but a series of erroneous interpretations of Title VII, originating primarily in the *Gillin* dicta and unwittingly compounded year after year. *See*, Petition for Writ of Certiorari at 9-10 where Swanson relies upon this particular line of case law.

Where courts have refused to blindly adhere to past precedent on the nominal damages issue, they have concluded that the language of Title VII itself does not permit an award of damages to a plaintiff. The Seventh Circuit reached precisely that conclusion in *Bohen* and in *Swanson*. Similarly, in *Harrington v. Vandalia-Butler Bd. of Ed.*, 585 F.2d 192 (6th Cir. 1978), the court conducted an independent analysis of the damages issue under Title VII and determined that nominal damages were not a permissible remedy.

Damages, whether nominal, compensatory or punitive, are not permissible under Title VII of the Civil Rights Act and the Seventh Circuit has correctly decided the issue here.

B. "Nominal" Damages Are Damages And Cannot Be Equated With Equitable Relief.

In her petition, Swanson suggests that "nominal" damages are not damages at all but rather are a means of judicial recognition that a right has been violated. Petition for Writ at 9. Swanson's argument is based on a patent oversimplification of the purpose of "nominal" damages. "Nominal" damages are available only if compensatory damages can be theoretically obtained but tangible loss has not been proved. *Carey v. Piphus*, 435 U.S. 247 (1978). Under Title VII, compensatory damages are unavailable under any circumstances. Therefore, "nominal" damages cannot be awarded. The Seventh Circuit has utilized this analysis in Title VII cases. In *Swanson*, the Seventh Circuit specifically adopted the district court's reasoning in *Bohen v. City of East Chicago, Indiana*, 622 F.Supp. 1234 (1985). As the district court stated in that case:

> "Although I understand why some courts permit the award of nominal damages, I do not agree with their decisions. Nominal damages are not "equitable" relief within the meaning of Title VII. The statute does not mention them, and I could not award them without offering the defendants a jury trial. Too, "nominal" damages are not something a court awards just to keep a case alive. The traditional award of one dollar is the remedy in a case in which compensatory relief is available in principle, but plaintiff did not establish the amount of injury and so cannot obtain a substantial award. Substantial injury yields a substantial award, nominal injury a nominal award. See *Carey v. Piphus*, 435 U.S. 247, 262-67, 98 S.Ct. 1042, 1051-54, 55 L.Ed.2d 252 (1978). A judge who lacks the power to award

> substantial damages that have been proved – and Bohen's anguish would support award of at least $20,000 in compensatory damages – may not use nominal damages as heart balm. The reasons that block an award of actual damages also block an award of nominal damages. See *Harrington v. Vandalia-Butler Board of Education*, 585 F.2d 192, 198 n. 6 (6th Cir. 1978)."

Moreover, as the district court in *Bohen* recognized, the allowance of "nominal" damages under Title VII would raise Seventh Amendment trial by jury issues. If damages are not available, the Seventh Amendment does not apply.

In short, Swanson's only viable claim at this point is not for equitable relief, reinstatement or back pay, which are the extent of the remedies permitted under Title VII. It is apparent that Swanson seeks to recover damages for a supposedly hostile work environment at Elmhurst, where she was formerly employed. However, she cannot obtain any equitable relief since she was legally terminated before this lawsuit was filed. The only relief which she could possibly pursue is one for damages. But that route has been foreclosed by Title VII itself.

C. Recent Supreme Court Decisions Support The Seventh Circuit's Ruling.

The impetus behind "nominal" damages awards is often to serve as a predicate for the allowance of attorney's feed and costs to a plaintiff. Recent decisions by this Court have emphasized that a plaintiff must be entitled to some relief in order to be considered a "prevailing party" for the purpose of attorney's fee awards. Although

these cases involved claims under 42 U.S.C. §1988, the legal principles underlying these decisions apply with equal force to Swanson's Title VII claims.

In *Hewitt v. Helms*, ___ U.S. ___, 107 S.Ct. 2672 (1987), this Court held that a plaintiff must be entitled to some relief on the merits of his claim in order to be considered a "prevailing party" under 42 U.S.C. §1988. If neither damages nor equitable relief is available, the mere judicial statement that the plaintiff's rights were violated is not sufficient to confer prevailing party status on the plaintiff. 107 S.Ct. at 2676-77. The *Hewitt* rule was recently affirmed in *Rhodes v. Steward*, ___ U.S. ___, 109 S.Ct. 202 (1988).

Here, the District Court made the judicial statement that a hostile work environment existed at Elmhurst vis-a-vis the plaintiff. However, no relief was available to the plaintiff, because she had been terminated for a valid, non-discriminatory reason. Under these circumstances, as in *Hewitt*, Swanson could never have become a prevailing party entitled to attorney's fees.

Hewitt and *Rhodes* provide additional support for the Seventh Circuit's decision here. Indeed, *Hewitt* and *Rhodes*, being settled law, amply justify denial of the petition for writ of certiorari here. The issues raised by Swanson are, at their root, merely a rephrasing of the question, already decided in *Hewitt* and *Rhodes*, albeit clothed in a Title VII content. Certiorari is unwarranted in this case based on the prior precedent established by this court and the limited nature of the issue presented.

III.

SWANSON WAS NOT SUBJECTED TO A HOSTILE WORK ENVIRONMENT

In the event that the Court should determine that certiorari should be granted with respect to the "nominal" damages issue, the Court must then address a still thornier issue: whether an employer's ribald sense of humor can rise to the level of prohibited sexual harassment. This inquiry, of necessity, raises First Amendment concerns about the viability of Title VII hostile environment claims where the employer's speech is involved.

In *Meritor Savings Bank v. Vinson*, ___ U.S. ___, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986), the Supreme Court held that sexual harassment in the workplace is a form of employment discrimination prohibited by Title VII. The elements necessary to constitute a sexual harassment claim under Title VII are as follows:

> "(1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability."

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), interpreting *Meritor Savings Bank*, 106 S.Ct. at 2404-06; *accord, Highlander v. KFC National Management Co.*, 805 F.2d 644 (6th Cir. 1986). Some courts have

included a sixth element, i.e., that the employee has acted reasonably under the circumstances. *Volk v. Coler,* 638 F.Supp. 1555, 1558 (C.D. Ill. 1986) and cases cited therein.

Implicit in these criteria is the notion that the sexual harassment must be sufficiently pervasive and debilitating to create a hostile work environment. As stated by this Court, the harassment must be "sufficiently severe or pervasive to alter [the victim's] conditions of employment and create an abusive working environment". *Meritor Savings Bank, supra,* 106 S.Ct. at 2406.

In reviewing hostile work environment claims, the trier of fact must consider the totality of the circumstances in light of the evidence presented. *Rabidue v. Osceola Refining Co.,* 805 F.2d 611, 620 (6th Cir. 1986). Offensiveness of the conduct, if any, cannot be judged by simply proving that sexual remarks were made without considering the context of the remarks. *Downes v. F.A.A.,* 775 F.2d 288 (C.A. Fed. 1985). The circumstances present in the work environment must be assessed from the perspective of a reasonable person's reactions to like circumstances. *Rabidue,* 805 F.2d at 620. If the hypothetical, reasonable person would have been harmed by the alleged conduct, then the plaintiff must further demonstrate that she herself was offended and suffered some degree of injury as a result of the abusive and hostile environment. *Rabidue,* 805 F.2d at 620.

Isolated or sporadic instances of harassment are insufficient to create an abusive working environment. *Katz v. Dole,* 709 F.2d 251, 256 (4th Cir. 1983); *Volk v. Coler, supra,* 638 F.Supp. at 1558. Repetitive, pervasive, and psychologically debilitating effects must be shown by the

plaintiff to state a claim for sexual harassment. *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213-14 (7th Cir. 1986).

Applying the foregoing tests to the present case, it is clear that the Swanson evidence fell far short of meeting the legal criteria of a sexually harassing environment. Even interpreting the evidence most favorably to Swanson, there was no showing that Roger Meacham's behavior[1] created a pervasive, debilitating work atmosphere which would have affected the psychological well-being and work performance of a reasonable female employee.

All of the witnesses in this case, including Swanson, have testified that Meacham was an inveterate, irrepressible prankster. He would kid and tease all his employees, both male and female. The employees, in turn, often played pranks on Meacham, e.g., hosing him down, spraying him with shaving cream, etc.

Meacham did not merely tolerate a light-hearted, playful atmosphere at Elmhurst Chrysler, he actively encouraged it. In his thirty years of experience in the automobile sales trade, he had found this style of management to be the most effective way to get the job done. Swanson's witness, Briedes, admitted that Meacham's antics were done light-heartedly and in jest. (T. 89-90)

Informality was the hallmark of Meacham's management style and jokes were an integral part of effectively imparting that style into the working environment at Elmhurst Chrysler. While Swanson may not have appreciated Meacham's brand of humor, even she admitted that

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[1] Roger Meacham was the manager at Elmhurst whose conduct was found to be sexually harassing by the Court.

it was Meacham's way of fostering informality at work. (T. 189)

Other female employees found the work environment at Elmhurst Chrysler to be very pleasant. These employees variously described the atmosphere as informal, friendly, familial, and a nice place to work. They were aware of Meacham's penchant for teasing and kidding, but considered it a "happy type of kidding". (T. 228) None of them took it seriously. All of these employees testified that they had never seen Roger Meacham conduct himself in a lustful or sexual manner towards any female employee.

The picture of the working environment at Elmhurst Chrysler, which emerges from the testimony at trial, is hardly the stuff of which Title VII violations are made. "Harassing", "abusive", and "psychologically debilitating" would actually be the most inappropriate possible adjectives with which to describe the environment at Elmhurst Chrysler. What is really in issue here is not the working atmosphere of Elmhurst Chrysler, but rather Roger Meacham's sense of humor. The plaintiff Swanson found his humor offensive. Other female employees did not.

Viewed in the context of Meacham's management style and the totality of the circumstances, each and every incident of "sexual harassment" alleged by Swanson, had humor underlying it. Meacham's humor may have been ribald or off-color at times. However, it was certainly no more bawdy than many of Chaucer's Canterbury Tales or, for that matter, many of the programs aired on prime-time TV. Title VII has never been interpreted to prohibit

bawdy jokes – nor should it be. Title VII is simply not a "clean language Act". *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 n. 2. Placed in proper context, the alleged incidents of sexual harassment were actually nothing more than part of the good-natured kidding engaged in by virtually all of the employees at Elmhurst Chrysler.

If Title VII is interpreted to bar Meacham's off-color sense of humor (which is not obscene in any sense of the word), serious First Amendment concerns arise and the constitutionality of Title VII itself is called into question.

There is no necessity of reaching these difficult issues, however, Certiorari should be denied because Swanson's case is neither meritorious nor does it present matters of crucial importance for this Court to decide.

CONCLUSION

For these reasons, Swanson's petition for a writ of certiorari should be denied.

Respectfully submitted,

/s/ Steven P. Bloomberg

STEVEN P. BLOOMBERG
GEORGE A. MARCHETTI
STUART GORDON
MOSS AND BLOOMBERG, LTD.
305 West Briarcliff Road
P. O. Box 1158
Bolingbrook, IL 60439
(708) 759-0800

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